IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4781

PARKER SEAL COMPANY, *Petitioner,*

v.

PAUL CUMMINS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE SEVENTH-DAY ADVENTIST CHURCH, AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-748

PARKER SEAL COMPANY, *Petitioner,*

v.

PAUL CUMMINS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE SEVENTH-DAY ADVENTIST CHURCH, AMICUS CURIAE

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

For the reasons herein stated, the Seventh-day Adventist Church, *amicus curiae,* respectfully submits that the judgment of the court below should be affirmed.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is a religious denomination whose membership follows the command of the Bible that the Sabbath, the Seventh-day, be set aside from work

and other worldly endeavors.[1] The respondent here is a member of another denomination observing the Sabbath. The interest of the *amicus curiae* in the outcome of this case is obvious. The petitioner has challenged the validity of national laws and regulations that would require employers to accommodate the religious needs of employees, including those who observe the seventh day as holy. Adherents to the religious tenets of this denomination, as well as others who observe a day of rest because of their religious beliefs, will be directly affected by the judgment of the Court in this case.

Amicus curiae has secured the written consent of both parties to filing a brief herein (see Appendix). The letters of consent have been filed with the Office of the Clerk.

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[1] The observance of the Sabbath for the *amicus* is by no means an arbitrary, mechanical, ritualistic practice. Rather, he sees a mandate for the Sabbath in the fourth of the Ten Commandments where it is portrayed as a specific weekly memorial to the creative power of God and as the believer's invitation to a particular and personal fellowship with God (Exodus 20:8-11). As suggested by Deuteronomy 5:12-15, the observance of the Sabbath is a symbol also of man's creation in the image of God with the dignity of free choice and freedom from servitude.

Amicus views the Sabbath as the day carefully observed by the man Christ Jesus and released by Him, as Lord of the Sabbath day, from the demeaning encrustations of human traditions (Luke 4:16; Matthew 12:1-13, Mark 2:27, 28). Also, as indicated in Hebrews 4, the Sabbath rest is both a symbol of the Christian's deliverance from the bondage of sin by the redemptive and creative power of Jesus Christ and of rest from his unavailing effort to earn salvation by the merit of his own works. More than a recommended religious practice, the observance of the Christian Sabbath is, for the *amicus*, a sign of the restored harmonious relationship between the believer and his Creator-Redeemer (Ezekiel 20:12).

ARGUMENT

Petitioner has raised two questions for resolution by this Court. The first is a question of law. Do §§ 701(j) and 703(a)(1), of the 1964 Civil Rights Act 42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1), and Equal Employment Opportunity Commission (E.E.O.C.). Guideline 1605.1, 29 C.F.R. § 1605.1, violate the Establishment Clause of the First Amendment? It is this question that is of prime interest to *amicus*. We assert that this question should be answered in the negative: there is no constitutional violation.

The second question is a question of fact. Did petitioner carry its burden of persuasion that it could not reasonably accommodate its operations to permit its employee, the respondent, to fulfill his religious obligations? We assert that this question, too, should be answered in the negative. Petitioner has not carried its burden to sho hat it cannot reasonably comply with the requirements of the Civil Rights Act of 1964 and the E.E.O.C. Guidelines.

I. The Constitutional Question: the Statutory Command that Petitioner Not Discriminate Against Its Employees on Religious Grounds Is Clearly Justified by Sherbert v. Verner.

At the outset it should be noted that the constitutional question raised here is far broader than the application and validity of §§ 701(j) and 703(a)(1) of the Civil Rights Act of 1964 and the E.E.O.C. Guideline 1605.1. The constitutional justification for a statutory ban on religious discrimination in employment is the same as that for banning discrimination in employment on grounds of race, or sex, or ethnic background. Admittedly, neither the First Amendment nor the Fourteenth Amendment operates directly on nongovernmental entities in this regard. But both are sources of rules that the national legislature may impose on private in-

dividuals and entities. If there is no constitutional justification for banning discrimination, there is no such justification for banning discrimination by race, or sex, or ethnic origins. Thus, the basic issue raised by this petition is whether Title VII, as applied to nongovernmental entities, is a constitutional exercise of Congressional power.

The question, then, is whether Congress may impose on private employers at least the same interdiction against religious and racial and ethnic and sex discrimination that the Constitution itself imposes on the national and state governments. It has been decided that the legislative power may even prohibit discrimination that would not be banned by the Constitution if exercised by a governmental agency. Thus, the Court of Appeals for the Second Circuit, in *Communications Workers* v. *American T. & T. L.L. Dep't*, 513 F.2d 1024, 1031 (2d Cir. 1975), has said:

> Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce. Heart of Atlanta Hotel v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964). [Ftnt. 12: "This is in addition to the Congressional power under Section 5 of the Fourteenth Amendment to enforce by appropriate legislation, the dictates of the Equal Protection Clause. . . ."]
>
> Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discrimination practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.

It is not necessary here, however, to decide whether the scope of the statutory ban may exceed the scope of the constitutional ban. For this Court has decided in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), that the kind of accommodation demanded of the employer here was constitutionally compelled when the discriminating party was a State. In *Sherbert*, the State was prepared to provide unemployment compensation only for those who were available to work on Saturdays, and not for those who, for religious reasons, would not accept employment that required work on the Sabbath. The Court held that this was an invalid discrimination that threatened, without justification, the appellant's freedom of religion. In response to the question whether compelling such special treatment for a Sabbatarian would constitute an invasion of the Establishment Clause, the Court's answer was clear and unambiguous:

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which is the object of the Establishment Clause to forestall. See *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor

> do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society . . . [374 U.S. at 409-10.]

This language is equally applicable, *pari passu,* to the facts of this case.

Thus, to hold that the legislative command in Title VII against religious discrimination violates the provisions of the First Amendment would be to turn that Amendment on its head. Its essential purpose, recognized throughout the Court's decisions, is to avoid unnecessary imposition, both by state and church, on religious minorities. Surely the Court can find no infringement of that command in a legislative mandate that private employers, too, avoid religious discrimination.

II. The Constitutional Issue: the Statute and Regulation in Issue Here Meet the Three-Pronged Test of Lemon v. Kurtzman and Its Progeny.

The three-pronged test on which petitioner would place such heavy reliance derives from *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971). This test is met in each of its particulars by the statute and guideline in question here.

The purpose of the legislative act is totally secular. It seeks to avoid discrimination in employment on grounds that are irrelevant to the employment involved, whether they be prejudices grounded in race, sex, ethnic origin, or religion. The secular purpose of the legislation is admirably stated in the quotation from the *Communication Workers* case, set out above at pp. [4-5] of this brief.

The secular goal is nondiscrimination in employment. The statutory ban on discrimination, whether on religious, racial, sex, or ethnic grounds, is the means by which this secular goal is to be effected. And this Court, in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), and *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), has recognized and enforced this secular objective of nondiscrimination in terms that are equally applicable here.

Nor is there any invalid benefit conferred on any religious organization or group by the statute or guideline. At most it may be said that a hardship on an individual, that would otherwise be suffered because of his religious beliefs, will now be alleviated.

Thus, although there is no evidence whatsoever to support the proposition that the Sabbatarian churches will be the beneficiaries of the statute or regulation, it is clear from this Court's decisions that any incidental benefit from this requirement of religious nondiscrimination would not be a basis for invalidating the law. That is not only the clear lesson of *Sherbert* v. *Verner, supra,* but has clearly been the rule repeatedly announced by this Court since *Lemon* v. *Kurtzman.* See, *e.g., Roemer* v. *Board of Public Works* — U.S. —, 44 U.S. Law Week 4939 (21 June 1976); *Tilton* v. *Richardson,* 403 U.S. 671 (1971); *Walz* v. *Tax Commission,* 397 U.S. 644 (1970); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); and *Everson* v. *Board of Education,* 330 U.S. 1 (1947). Wherever freedom of religion is protected by the First Amendment guarantees and laws in support of them, the churches will receive some incidental benefit from the fact that its members are allowed to act in accordance with their religious

commitments. See *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

As this Court only recently announced: "*Everson* and [*Board of Education* v.] *Allen*[, 392 U.S. 236 (1968)] put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity." *Roemer* v. *Board of Public Works, supra,* at 4942. Petitioner seeks to assert a standard that was specifically rejected in the case that gave rise to the three-pronged test. "The objective is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Lemon* v. *Kurtzman, supra,* at 614. The Court went on to reject the concept of "total separation" for which petitioner contends:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense . . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a "Wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. [*Id.* at 614.]

Obviously there is no undue entanglement between church and state in a law forbidding religious discrimination by compelling employers to "accommodate" in the same manner as the First Amendment compels the national and state governments to accommodate. There is no entanglement at all. As this Court put the question in *Meek* v. *Pittinger,* 421 U.S. 349, 372 (1975), the decision on which petitioner relies: "Given the nature of the aid and the nature of the recipient, how much surveillance of the religious institutions by the state is required?" The answer, here, as indicated is none.

III. The Factual Question: Could Petitioner Accommodate Respondent's Religious Needs "Without Undue Hardship on the Conduct of the Employer's Business"?

The question whether petitioner could accommodate to respondent's religious needs "without undue hardship on the conduct of the employer's business," (E.E.O.C. Guideline 1605.1, 29 C.F.R. § 1605.1) is obviously not a question of law but one of fact. The Court of Appeals ruled that the employer could so accommodate itself. It rested its conclusion on the fact that until the appointment of a new plant manager, the petitioner did indeed accommodate respondent's religious needs and that other means than those used were available to it to work out that accommodation. The essential argument for not continuing that accommodation, as set forth in petitioner's brief (p. 9), was: "The plant manager could not overlook the smoldering resentment among Cummins' fellow supervisors." The Court of Appeals found that to be an inadequate reason to justify discrimination. It is hard to gainsay the Court of Appeals findings:

> In the case at bar, however, Appellee has shown no such dire effect upon the operation of the business. To the contrary, the complaints of Appellant's fellow supervisors seem both mild and infrequent. In addition, it appears that Appellee might have alleviated at least some of the dissension if it had pursued a more active course of accommodation. For example, Appellee's officials could have required Appellant to work longer hours on week days or on Sundays. They could have reduced Appellant's salary commensurately with his shorter work week. They could have taken pains to ensure that Appellant substituted for his colleagues on an equitable basis, rather than assuming that the coworkers would make

appropriate demands upon Appellant. [516 F.2d 550]

Certainly the record supports the conclusion of the Court of Appeals. Certainly there is no reason in this record for this Court to reject the conclusion. The burden here, as in *Duke Power* and *Albemarle, supra,* was on the employer to demonstrate good reason for its lack of accommodation. The record demonstrates that petitioner did not meet that burden.

CONCLUSION

There would be irony, indeed, if the provisions of the First Amendment were held, as petitioner demands, to compel religious discrimination rather than to prevent it, when prevention of religious discrimination is of the essence of the First Amendment. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 13, 1976

APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner's Consent to the Filing of an Amicus Curiae Brief

Now Comes Leonard H. Becker, Counsel for the Petitioner, Parker Seal Company, and pursuant to Rule 42 of the Rules of the Supreme Court of the United States, hereby Consents to the filing of an Amicus Curiae Brief by the Seventh-day Adventist Church on behalf of the Respondent, herein, Paul Cummins.

/s/ LEONARD H. BECKER
Leonard H. Becker
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1229 Nineteenth Street, N.W.
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DATED: May 26, 1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent's Consent to the Filing of an Amicus Curiae Brief

Now Comes Thomas L. Hogan, Counsel for the Respondent, Paul Cummins, and pursuant to Rule 42 of the Rules of the United States Supreme Court, hereby Consents to the filing of an Amicus Curiae Brief by the Seventh-day Adventist Church on behalf of said Respondent.

/s/ THOMAS L. HOGAN. .
Thomas L. Hogan
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DATED: 5/26/76